

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

* * * * *

MICHAEL BIRRER,)	
)	
Appellant,)	
)	OSPI 133-87
v.)	
)	DECISION
TRUSTEES, SCHOOL DISTRICT NO. 16,)	AND
WHEATLAND COUNTY,)	ORDER
)	
Respondents.)	

* * * * *

This matter has been submitted on briefs from the parties, and involves the statutory procedure for termination of a tenured teacher, Michael Birrer, as set forth in Section 20-4-204, MCA, with its 1985 amendments. The Notice of Appeal filed by Appellant raises issues of law concerning the procedures followed by the Respondent Board of Trustees in terminating Appellant, as well as factual errors in Findings of Fact No. 9, and Conclusions of Law No. 3 and No. 6.

I find these issues relate to a legal determination as to the sufficiency of due process procedure followed by Respondent Trustees in terminating Appellant.

The facts concerning this termination are not in dispute and are set forth in the County Superintendent's Findings of Fact as Findings NO. 1 through No. 10. The Findings of Fact of the County Superintendent which I adopt are as follows:

FINDINGS OF FACT

1 1. Michael F. Birrer, [Petitioner], was a
2 tenured teacher employed in Respondent's Harlowton
3 school system to teach music. He has a K-12 music
4 endorsement and a secondary English endorsement. He
5 has been teaching band and chorus in the high school;
6 band and music in the junior high school. He does not
7 have endorsement as an elementary classroom teacher.

8 2. At the regular meeting of the Board of
9 Trustees of Harlowton Public Schools on March 9, 1987,
10 the District Superintendent, Gary Scott, presented his
11 recommendation for cuts in the high school budget,
12 which included a reduction in force of two secondary
13 teachers. One of the positions recommended for
14 elimination was that of a music teacher. The music
15 teacher with the least seniority was Michael F.
16 Birrer. Mr. Birrer was present at the March 9, 1987,
17 meeting of the Board. The Trustees unanimously voted
18 not to offer Birrer a teaching contract for the school
19 year 1987-88 because of overstaffing and lack of
20 funding.

21 3. On March 10, 1987, Board Chairman Lammers
22 notified Birrer in writing that the Board had voted
23 not to renew his contract for the reasons of
24 overstaffing at the secondary level and lack of
25 funding. The written Notice was personally delivered
26 to Birrer on March 10, 1987, by the District
27 Superintendent in the District Superintendent's
28 office. A signed receipt for the Notice was not
29 returned. The Notice was not mailed. Birrer did not
30 waive the hearing before the Board.

31 4. On March 30, 1987, as scheduled, the Trustees
32 conducted the hearing. Birrer was present and the
33 Trustees afforded him opportunity to present any
34 evidence he had. At the conclusion of the hearing,
35 the Trustees resolved that the decision to terminate
36 stand. Birrer received written notification of the
37 Board's action served upon him on April 1, 1987.
38 There are no other written communications between the
39 Parties relative to this appeal. He was also notified
40 of his right to appeal to the County Superintendent of
41 Schools and did appeal on April 20, 1987.

1 5. The justification for the reduction in force
2 by Respondent, being overstaffing and lack of funding,
3 is fully supported by the evidence (Respondent's
4 Exhibits 1-14).

5 6. There is no teacher with less seniority in
6 the school district which Petitioner can replace by
7 reason of his certification and endorsement.

8 7.. Petitioner was informed of the District
9 Superintendent's recommendation to terminate his
10 employment, offered in his presence on March 9, 1987
11 (Respondent's Exhibit 15).

12 8. Petitioner was further personally notified in
13 writing of the recommendation and was personally
14 notified in writing of the recommendation and was
15 personally notified of the date for a hearing on the
16 recommendation on March 10, 1987. Petitioner admitted
17 that he received personal notification in writing of
18 the date for the hearing on the recommendation and of
19 the recommendation.

20 9. At a March 9, 1987 Board meeting, the
21 Chairman of the Board read from Section 20-4-204, MCA.
22 The Board was aware of the procedural requirements of
23 the statute. The action taken by the Board on March
24 9, 1987, was only preliminary action, and such
25 decision was considered by the Board not to be a final
decision.

10 10. At the Board meeting on March 30, 1987, ,
11 the Chairman announced that the hearing was called
12 according to Section 20-4-204, MCA. Again, the Board
13 was aware of the procedural requirements of the
14 statute. The Board did not take final action on the
15 Superintendent's recommendation until the Petitioner
16 had been given the opportunity to be heard on March
17 30, 1987.

18 11. The termination was not personal to the
19 Petitioner and resulted only from a reduction in
20 force. There were no allegations of immorality,
21 unfitness, incompetence, or failure to follow Board
22 policies.

23 The Conclusions of Law of the County Superintendent which I
24 adopt are as follows:
25

CONCLUSIONS OF LAW

1 1. Petitioner was notified of the
2 Superintendent's recommendation for termination.

3 2. Petitioner was timely notified of his right
4 to a hearing on the recommendation. Although signed
5 receipt was given for the notification, Petitioner
6 admits being notified, and the intent of the statute
7 was fulfilled. No prejudice was shown to have
8 resulted to Petitioner because of the lack of a signed
9 receipt.

10 3. The action taken by the Board on March 9,
11 1987, was only preliminary action.

12 4. Petitioner was afforded opportunity to be
13 heard before the Board and to present any evidence he
14 had.

15 5. The reduction in force was justified.

16 6. A hearing on the Superintendent's
17 recommendation was held by the Board prior to making
18 its final decision.

19 7. The termination of Petitioner's employment
20 was only because of the reduction in force and had no
21 bearing on his professional competence and there were
22 no allegations of immorality, unfitness or failure to
23 follow Board policies.

24 8. The procedure in Section 20-4-204, MCA, was
25 complied with in good faith and the Board had no
intent to deprive Petitioner of his procedural due
process rights.

The County Superintendent held her hearing on June 23, 1987
pursuant to Section 20-4-204, MCA, and issued her Order dated
July 15, 1987, which was appealed by the attorney for Mr. Birrer
on July 24, 1987. The Standards of Review governing my review
are set forth in Section 10.6.125, ARM, as well as in Section 2-
4-703, MCA.

At the outset, the focus of Section 20-4-204, MCA, and its 1985 amendments, as well as the argument advanced by Appellant Birrer herein that the "entire" legislative purpose in amending the statute was to provide a hearing "prior" to a decision by the Trustees regarding termination, must be clarified.

A review of all of the interim committee minutes indicates the Board approach of the committee focused on termination of tenured teachers, and indeed, the whole issue of tenure itself. It is my determination, after full review of the interim committee minutes, that the intent of the 1985 legislature was to provide a hearing prior to a final decision of the Trustees. This is particularly true when the issue at hand involves a reduction in force -- a proceeding which does not relate to the competence or performance of a teacher, but rather to the economic and budgetary process, which is generally finalized in most Montana school districts in March prior to the running of the first voted levy in April.

Further, in this case, Appellant does not dispute or contest the necessity of the reduction in force or its applicability to his position. There is substantial, credible evidence in the record to support the findings of the County Superintendent, and the action of the Respondent Board of Trustees as to the applicability of the reduction in force to Appellant Birrer (Findings of Fact No. 5, No. 6, and No. 11).

1 Still, Appellant argues in this matter, that it was
2 irreversible error for Respondent Board of Trustees to act on the
3 "RIF" recommendation made by the District Superintendent prior to
4 the hearing required by Section 20-4-204, MCA. The record is
5 replete with substantial, credible evidence indicating that
6 Respondent Board was aware of the requirements for a hearing
7 prior the final determination, and held such a hearing on March
8 30, 1987. If indeed, the March 9, 1987 action by the Board was
9 void for failure to follow the statutory procedure, and indeed,
10 Respondent Board has never suggested that its action on March 9,
11 1987 was final, I hold that the Board did follow the proper
12 statutory procedure set forth in Section 20-4-204, MCA, through
13 its notice to Appellant and subsequent hearing on March 30, 1987.
14 See LaCroix v. Board of Education of City of Bridgeport, 505 A.2d
15 1233 (Conn. 1986), 31 Ed.Law Rep. 142.

16 Further, Appellant's reliance on Wyatt v. School District
17 No. 104, 148 Mont. 83, 417 P.2d 221 (Mont. 1966), is misplaced,
18 because the termination was preceded by a hearing as required by
19 statute.

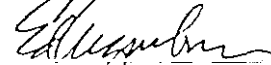
20 In conclusion, the County Superintendent's decision is not
21 based on any error of law, or refusal or failure to apply the
22 statutory procedure as set forth in Section 20-4-204, MCA. There
23 is substantial, credible evidence in the record to support all
24 Findings of Fact and Conclusions of Law, including Finding of
25

Fact No. 9 and Conclusion of Law No. 3 by the County Superintendent. There is no error of law which effects Conclusion of Law No. 6 nor any other conclusion by the County Superintendent. I have fully reviewed the other specifications of error by Appellant and reject them in view of the substantial, credible evidence in the record which supports the County Superintendent's decision.

Therefore, the County Superintendent's Findings of Fact, Conclusions of Law, and Order are hereby:

AFFIRMED.

DATED this 17th day of June, 1988.


Ed Argenbright
State Superintendent

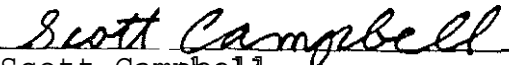
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 17th day of June, 1988, a true and exact copy of the foregoing DECISION AND ORDER was mailed, postage prepaid, to:

Emilie Loring
~~121 4th St. N.~~ P.O. Box 1319
~~Suite 2G~~ Big Fork, MT 59911
~~Great Falls, MT 59401~~

Chadwick H. Smith
P.O. Box 604
Helena, MT 59624

Effie Winsky
County Superintendent of Schools
Wheatland County Courthouse
Harlowton, MT 59036


Scott Campbell
Office of Public Instruction